JD(SF)-37-17
Petaluma, California

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

DELTA SANDBLASTING COMPANY, INC.

and **Case 20–CA–176434**
32–CA–180490

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 16

Cecily A. Vix, Esq., for the General Counsel.

Alan S. Levins and *Paul E. Goatley, Esqs. (Littler Mendelson),* for the Respondent.

David A. Rosenfeld and *Caroline N. Cohen, Esqs. (Weinberg, Roger & Rosenfeld),* for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARA-LOUISE ANZALONE, Administrative Law Judge. I heard this case on March 30, 2017, in San Francisco, California. Charging Party International Union of Painters and Allied Trades, District Council 16 (Charging Party or the District Council) filed a charge on May 16, 2016, and the Regional Director for Region 20 issued an order consolidating cases, consolidated complaint and notice of hearing on October 27, 2016 (the complaint). The General Counsel alleges that Respondent Delta Sandblasting Company, Inc. (Respondent or Delta) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing and refusing to execute a complete written agreement reached with Auto, Marine & Specialty Painters Local Union No. 1176 (Local 1176 or the Union), as well as by unilaterally decreasing the amount of its pension fund contributions. As set forth in detail below, I find that the General Counsel has proven the second, but not the first, of these allegations.

At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and

to file post-hearing briefs. On May 18, 2017, post-hearing briefs were filed by the General Counsel (joined by Charging Party) and Respondent and have been carefully considered.[1] Accordingly, based upon the entire record herein, including the post-hearing briefs and my observation of the credibility of the witnesses, I make the following

FINDINGS OF FACT

A. Jurisdiction

At all times material herein, Respondent, a California corporation with a principal place of business located in Petaluma, California, has been engaged in providing painting and sandblasting services in the marine repair industry. During the 12-month period immediately preceding the issuance of the instant complaint, Respondent, in the normal course and conduct of its above-described business operations, purchased and received at its Petaluma facility goods in excess of $50,000 directly from points outside the State of California. It is alleged, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. I additionally find, based on the testimony of Charging Party's Director of Service José Santana (Santana), that it is a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the National Labor Relations Board (the Board) has jurisdiction of this case, pursuant to Section 10(a) of the Act.

B. Factual Background

Delta is a family owned business that performs marine sandblasting and painting services in the San Francisco Bay area. Its number of employees varies between six and fifty workers, based on the demand for its services. Delta was owned and operated by its president, James "Bobby" Sanders, Sr. (Sanders) until his death on May 4, 2016. Thereafter, Delta's operations were taken over by his son, Robert Sanders, Jr. (Sanders, Jr.). For many years, Local 1176 has represented a unit of sandblasters employed by Delta (the unit). The Union has delegated responsibility for bargaining over the unit to the District Council. Santana is responsible for overseeing Local 1176; since 2008, he has also served as the business representative responsible for dealing with Delta. (GC Exh. 1(g), 1(l); Tr. 18–22, 97, 219, 229, 246, 251)

1. The parties' bargaining history

Historically, collective bargaining negotiations between the parties were extremely informal, consisting of a series of brief phone calls and a few in-person discussions. This was largely due to the fact that each such negotiation occurred only after the District Council had settled a contract with a general contractor in the industry known as "BAE" (to which Delta acts as subcontractor). The District Council would then ask Delta to agree to the same terms (including wages and benefits), and Delta would assent. Prior to 2014, Delta paid the unit employees over

[1] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "GC Br." for the General Counsel's post-hearing brief and "R. Br." for Respondent's post-hearing brief.

the BAE contractual wage rate, which made agreeing to the BAE terms that much easier. Since at least 2007, the parties also agreed to a "Supplemental Agreement" that provided for certain departures from the BAE contract tailored towards Respondent's business. (Tr. 20, 23–25, 239; GC Exh. 2)

The last signed collective-bargaining agreement between the parties expired on August 31, 2015. This contract was reached after a series of phone calls and a single in-person meeting between Santana and Sanders.[2] Consistent with past practice, these negotiations were preceded by the Union reaching an agreement with BAE; unlike in past years, however, the BAE-negotiated wage rate surpassed that which Delta was paying the unit employees. According to Santana, he informed Sanders that Delta would need to bring its wages up to match those paid by BAE. Sanders agreed and signed a written collective-bargaining agreement (the Expired Contract). (GC Exh. 1(i) ¶ 6(b), 2, 3; Tr. 24–26, 35–36)

2. Respondent's pension contributions

Pursuant to the Expired Contract, Respondent was obligated to contribute to the Pacific Coast Shipyards Pension Fund (the Fund). Specifically, the agreement's Article 18.1 provides for a base contribution rate of $1.95 per hour. Moreover, pursuant to its Article 18.4, Respondent agreed to "instruct the Trustees of the applicable Pension Plans to take appropriate action to eliminate any unfunded liability that currently exists or unfunded liability that develops during the term of this Agreement as soon as practical." (GC Exh. 2)

The documentary evidence indicates that, in 2008, the Fund was designated as underfunded, and therefore became subject to a rehabilitation plan to address this status. Pursuant to that plan, Respondent became required to pay a substantial surcharge on its base contribution rate, bringing its total per-hour contribution rate up to $8.18, $9.78 and $11.28 in 2014, 2015 and 2016, respectively. It is undisputed that Respondent paid this surcharge until April 22, 2016. (GC Exhs. 17, 18, 20–22, 26; Tr. 142, 148–150**,** 159)

3. The parties' initial statements and conduct regarding a successor contract

As noted above, Sanders passed away on May 4, 2016, before signing another collective-bargaining agreement. The General Counsel alleges that, on about February 8, 2016, Sanders and Santana agreed verbally on the terms of a successor contract to which it should be bound. Because neither party offered any bargaining notes, I have based my factual findings regarding the circumstances surrounding this alleged verbal agreement on the testimony of Santana, another representative of the Union and certain statements by Sanders offered through other witnesses.

On June 24, 2015 (approximately 2 months before the 2008 Agreement was set to expire), Sanders informed Santana in writing that Delta was interested in negotiating a successor contract. (GC Exh. 4) Santana admitted that Sanders' letter concerned him, because it was more formal than the parties' typical means of communication. (Tr. 89) There is no reliable evidence of Sanders' motivation in sending the letter; while Sanders, Jr. testified that his father had

[2] Per the parties' usual, informal practice, these negotiations did not involve any exchange of written proposals, and neither Santana nor Sanders took bargaining notes. (Tr. 24)

expressed a desire to negotiate a simpler collective bargaining agreement "tailored to suit a small business," rather than one based on the BAE contract, this testimony on this subject was too vague and internally inconsistent to be reliable.[3]

Santana responded to the letter with a phone call 2 weeks later. According to Santana, he told Sanders at that time, "my thinking is that we would agree to whatever BAE got in wages and benefits." He initially testified that Sanders immediately stated that he "had no problem with it," but then revised his testimony, stating that Sanders only made this comment after confirming that Delta's supplemental agreement would continue to be included in the parties' contract. (Tr. 44–47)

According to Santana, the two next spoke in October 2015, when he called Sanders and informed him that the Union was having trouble reaching an agreement on wages with BAE. Sanders responded, "that's fine," and asked Santana to keep him posted. At some point in January 2016,[4] Santana called Sanders and told him that the Union had reached an agreement with BAE (not yet ratified by the membership) that provided for an annual raise of $1.10 for three years. Santana testified that Sanders simply responded "okay." On February 2, Santana called Sanders again, and informed him that the BAE agreement had been ratified and that the two men should get together and "go over it." He also reminded Sanders of the three-year wage increase contained in the BAE contract. As Santana testified, "I told him what the amounts were and he said, yeah, that's fine, José." The two agreed to meet on February 8 at Local 1176's office. (Tr. 47–48, 52–56)

4. The alleged February 8 "meeting of the minds"

On February 8, Sanders and Santana met as planned; also present for the Union was business agent-in-training Richard Morales, who observed but did not participate. According to Santana, the discussion about the BAE contract took only a couple of minutes at the beginning of the meeting and included a discussion of the $1.10 annual raise and "the healthcare and the pension." Sanders, he testified, said he was "fine with it." Despite the fact that the meeting had been arranged, in Santana's words, to "go over" the ratified BAE contract, he failed to show it—or any other documentation—to Sanders during this meeting. (Tr. 56–58)

Morales' recollection of the meeting was different. The discussion, he testified, did *not* begin with Santana informing Sanders about the BAE contract terms, but rather a discussion about an ongoing arbitration. Then, he recalled, "they had brought up [that] the contract with BAE *was going to be finalized* and that [Sanders] needed to come in and – and sign the agreement." According to Morales, instead of saying he was "fine" with any particular contract terms, Sanders said that *once* Santana had gotten the BAE contract signed, he (Sanders) "would come in and sign – review and sign it." Morales took notes at the meeting, which made no

[3] Sanders Jr. first testified that he discussed this issue with his father "a couple of different times," at which point he was interrupted by his own counsel, who suggested that he focus on the year 2015. After this, he testified that the first time he discussed this issue with his father was in 2015, and the last time was in "January or February 2016." Then, he suddenly remembered that he had discussed this issue with his father "quite often"—so often, in fact, that he couldn't even estimate how many times. (Tr. 240–241)

[4] Unless otherwise noted, all dates hereafter refer to the year 2016.

mention of a deal being struck, but simply characterized it as "a contract nego" with Sanders. (Tr. 111–112, 114)[5]

It is undisputed that the Union never presented Sanders with a written Delta contract for his signature. According to Santana, he and Sanders arranged in the beginning of March for a meeting for Sanders "to come in" to the Union hall. This never occurred (Sanders cancelled for health reasons); in any event, it does not appear that the Union had prepared a written contract in anticipation of Sanders' appearance at the hall. (Tr. 58, 64–65, 92; GC Exh. 6)

5. Conduct following February 8

a. Santana's impromptu April visit

According to Santana, he did direct Local 1176's administrative assistant to prepare a 2015–2018 collective-bargaining agreement for Delta in late March. Santana further testified—in a stilted, rehearsed manner—that he dropped in on Sanders unannounced in April because he was nearby Respondent's office. He did not bring a copy of the contract, but instead told Sanders it was "ready" for him to sign, and that he should come by Local 1176's office to do so. According to Santana, Sanders responded that he was "fine" with that. (Tr. 59–60) No other witnesses were present for this exchange. Respondent offered no evidence to rebut this testimony directly, but did present a less sunny picture of Sanders' relationship with the Union at the time; according to Respondent's witness Floyd Farley ("Farley"), Sanders spoke with him multiple times about the progress of negotiations with the Union. Sanders, he testified, was concerned that the Union was demanding that he sign an agreement, "but they wouldn't produce it." (Tr. 198–199)[6]

b. The May 3 phone call

It is undisputed that, in April 2016, and without prior notification to the Union, Delta ceased paying the surcharge portion of its pension contributions, submitting only the $1.95 base contribution amount, along with a note claiming an inability to pay the surcharge amount. On May 3, a Fund administrator informed Santana of this; he and Morales called Sanders the same day. (Tr. 61–62, 142, 148–150, 159) Testimony regarding this telephone conversation was offered by several witnesses:

- According to Santana, when confronted about the pension contributions, Sanders said, "I'm not going to pay it," to which Santana responded, "we had an agreement and you agreed to it that you were going to pay it and you were supposed to have come to my

[5] While Morales admitted that he was not present during a portion of the discussion, he was specific that his absence was at the end, not the beginning of the meeting (when Santana claims Sanders expressed that he was "fine" with the proposed terms). (See Tr. 132–133)

[6] I agree with Respondent that Sanders' expressions of trepidation about agreeing to the BAE contract terms qualify for the hearsay exception contained in Fed. R. Evid. 803(3). See *U.S. v. Ponticelli*, 622 F.2d 985, 991 (9th Cir.), overruled on other grounds by *United States v. De Bright*, 730 F.2d 1255, 1259 (9th Cir. 1984) (en banc). While I also agree that testimony by Sanders, Jr. that his father was concerned about rising labor costs is likewise admissible, I find such statements shed little light on whether he had reached a deal with the Union.

office to sign the agreement." Santana then testified that Sanders conceded, responding that he was in Mexico with his family, but adding "when [I] get back next Monday, I will call you and set up a time with you."

- Morales testified that Santana told Sanders that he owed money to the pension trust fund and "needed to come in and sign a – the agreement." Sanders, he recalled, responded that he was in Mexico and "that he wanted to review the contract and that he would have some questions."

- Farley testified that he observed Sanders on the phone in Mexico stating "something like, 'I'm in Mexico, I'll deal with it next week.'" and then, "do you realize you're threatening me over this phone right now?" After hanging up, Farley recalled, Sanders said something like, "I can't even go fishing in peace."

- Another friend, John Capovilla, recalled similar comments by Sanders, albeit in the opposite order. According to him, Sanders first said, "you're threatening me," and then explained that he was in Mexico and would talk to the caller when he got home the following week.

Santana explicitly denied that, during this conversation, he threatened Sanders or that Sanders accused him of doing so. (Tr. 61–62, 82, 124–125, 128–130, 202, 211)

Respondent also presented testimony by Sanders' wife (Joyce Sanders) and son (Sanders, Jr.) relating statements he made shortly following the call. Joyce Sanders testified that, on May 3, an upset Sanders told her that Santana had threatened him. Sanders, Jr. reported having a similar conversation with his father on May 4. (Tr. 232, 256–257)

ANALYSIS

A. The Parties' Positions

The General Counsel argues that Respondent violated Section 8(a)(5) of the Act when it failed and/or refused to execute a successor contract after the parties established a complete agreement on all of its substantive terms. The General Counsel alternately alleges that Respondent violated Section 8(a)(5) by unilaterally decreasing the amount of its pension contributions required by the Expired Contract. Respondent denies that it violated the Act in any respect, and specifically argues that: (a) no meeting of the minds occurred regarding a successor contract; and (b) it was not obligated to provide the Union with notice and an opportunity to bargain over its decision to reduce its pension contributions.

B. Credibility

The key aspects of my factual findings above incorporate the credibility determinations I have made after carefully considering the record in its entirety. The testimony concerning the material events underlying the General Counsel's allegations contain certain conflicts. I have based my credibility resolutions on consideration of a witness' opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; the impact of bias on the witness' testimony; the quality of the witness' recollection; testimonial consistency; the

presence or absence of corroboration; the strength of rebuttal evidence, if any; the weight of the evidence; and witness demeanor while testifying and the form of questions eliciting responses. As set forth below, I have credited the testimony of Morales over that of Santana when it came to the issue of whether a "meeting of the minds" occurred between the parties.

C. Duty to Execute a Fully Negotiated Collective-Bargaining Agreement

As noted, the General Counsel argues that, despite the lack of a signed successor contract, Respondent is bound to a collective-bargaining agreement verbally agreed to by the late Sanders. Respondent contends that no such agreement was reached.

1. The *"Heinz"* obligation and "meeting of the minds"

It is well established that the Board lacks the authority to compel a party to agree to any substantive contractual provision of collective-bargaining agreement. Thus, the Board may not order a party to execute an agreement to which it has not assented. *New Orleans Stevedoring Co.*, 308 NLRB 1076, 1081 (1992), enfd. 997 F.2d 881 (5th Cir. 1993). These principles are reflected in Section 8(d) of the Act, which requires "the execution of a written contract incorporating any agreement reached if requested by either party" but notes that "such obligation does not compel either party to agree to a proposal or require the making of a concession…."[7]

Accordingly, the obligation to execute a collective-bargaining agreement arises only once the parties have had a "meeting of the minds" on all substantive issues and material terms of the agreement. See *Sunrise Nursing Home*, 325 NLRB 380, 389 (1998). To prove a meeting of the minds, the General Counsel must prove that the parties' objectively manifested intent, as demonstrated by their communications with each other, as well as their "tone and temperament," shows that they agreed on all substantive issues and material terms contained in the alleged agreement. *Crittenton Hospital*, 343 NLRB 717, 718 (2004); *Diplomat Envelope Corp*., 263 NLRB 525, 535–536 (1982), enfd. 760 F.2d 253 (2d Cir. 1985). It is appropriate to evaluate the parties' conduct against the backdrop of their prior negotiations. *Electrical Workers IBEW Local 938*, 200 NLRB 850 (1972), enfd. 492 F.2d 1240 (4th Cir. 1974).

In determining whether an agreement has been reached by the parties, the Board is not strictly bound to "the technical rules of contract law but is free to use general contract principles adapted to the collective-bargaining context." *New Orleans Stevedoring Co*., 308 NLRB at 1081 (citing *NLRB v. Electra-Food Machinery*, 621 F.2d 956, 958 (9th Cir. 1980)). In this regard, verbal acceptance of the terms of collective-bargaining agreement will bind a party. *Capitol-Hustling Co. v. NLRB*, 671 F.2d 237, 243 (7th Cir. 1982) (in order to find acceptance of an offer, all that is needed is conduct manifesting intention to agree, to abide and be bound by the terms of an agreement). Such verbal acceptance may take the form of asset to an unsigned document with the intent to sign later. See *New Orleans Stevedoring Co.*, 308 NLRB at 1081; *Kelly's Private Car Service*, 289 NLRB 30, 39 (1988), enfd. 919 F.2d 839 (2d Cir. 1990). Moreover, even without explicit assent to a written document, a party's acceptance of an unambiguous verbal

[7] Prior to the enactment of Section 8(d), the Supreme Court had already reached essentially the same result; in *H.J. Heinz Co. v NLRB*, the Court held that, once the parties have reached an oral agreement, it is unlawful for one of the parties to fail to reduce to writing and apply that agreement. 311 U.S. 514, 526 (1941).

offer will create a binding contract. See *Pittsburgh-Des Moines Steel Co.*, 202 NLRB 880, 888 (1973) ("if words and conduct chargeable to one or any party have but one reasonable meaning, with respect to which the other party has noted concurrence, a contract will be deemed concluded on that basis").

The classic "hallmark indication" of a binding contract having been reached is the conclusion of a meeting (or series of meetings) "with handshakes and mutual expressions of satisfaction on the successful outcome of their endeavor." See *Windward Teachers Association*, 346 NLRB 1148, 1150–1151 (2006) (citations omitted). Conversely, evidence that, throughout the course of negotiations, the parties "stood pat" in their disagreement over at least one substantial and material contract provision will be found to indicate that they never reached a complete agreement. *Intermountain Rural Electric Assn.*, 309 NLRB 1189, 1193 (1992). Since many cases lack evidence of such recognizable indicia of manifested intent, the Board also affords significant weight to whether, following an alleged "meeting of the minds," the parties behaved as if they had, in fact, successfully entered into a new, binding contract. See *Windward Teachers Association*, supra.

2. The General Counsel failed to establish a "meeting of the minds."

Based on the application of the above principles, I find that, as of Sanders' passing, he and Santana had not reached a "meeting of the minds" on all substantive issues and material terms of a successor agreement as alleged. First, I do not credit Santana's testimony that the premise for the February 8 meeting was that the BAE contract had been ratified and that Sanders had orally assented to its terms by phone on February 2. Had this been the case, surely Santana would have come to the meeting six days later armed with the executed BAE contract (as he promised Sanders) for them to review. Remarkably, Santana offered no explanation for his failure to do so.

As for the February 8 meeting itself, not only did it lack the tell-tale, congratulatory handshake signaling that a deal had been reached, it was also missing the critical offer and acceptance elements. In this regard, I note that the General Counsel's own witness, Morales, did not corroborate Santana's vague assertions that he presented Sanders with wages and benefits based on the BAE contract. I instead credit Morales as to what occurred on February 8.[8] His account made it clear that on February 8, Sanders, at best, agreed to *review* the BAE contract once it was signed, but did not agree to its unsigned terms sight unseen. This version of the meeting was consistent with the parties' prior negotiations; while Sanders had, in the past, agreed to BAE's *negotiated* wage scale, there is no evidence that he had ever agreed to pay whatever BAE might ultimately agree to. It is further consistent with Farley's testimony that, on numerous occasions in 2015 and 2016, Sanders expressed concern that Santana was pressuring him to agree to the new BAE contract, sight unseen.

I further find that, following February 8, the parties did not behave as if they had, in fact, successfully entered into a new, binding contract. I found particularly unconvincing Santana's testimony that, later in April, he fortuitously found himself in the neighborhood of Respondent's

[8] As opposed to Santana's somewhat "prepackaged" explanations, Morales' testimony was grudging but unvarnished, leading me to believe that he knew it was not helpful to the General Counsel's case but was nonetheless true.

business later for an opportunity to "re-agree" that Sanders was willing to sign a written contract. This claimed encounter simply cannot be squared with the parties' confrontational May 3 phone call. While witness accounts of that call varied, I credit Morales' testimony that, when Santana accused Sanders of ceasing his pension surcharge contributions, he also demanded that Sanders "sign a – the agreement." In other words, Santana told Sanders that he needed to sign *an agreement* (i.e., not "the" agreement they had allegedly reached).[9] I further credit Morales' recollection of Sanders' response—that he wanted to review the Union's contract and "would have some questions." Based on the record as a whole, I find that, on May 3, Santana and Sanders were not making arrangements to sign a contract to which they had verbally agreed, but were in fact still at odds on substantive contractual issues, not the least of which was Respondent's duty to make certain pension contributions.[10]

For the reasons set forth above, the allegation that Respondent violated Section 8(a)(5) of the Act by failing and refusing to execute a complete written agreement reached with the Union is dismissed.

D. Duty to Bargain Before Ceasing Pension Contributions

The General Counsel argues that, even if no enforceable contract were formed by the parties' 2015–2016 conduct, Respondent violated Section 8(a)(5) of the Act by unilaterally ceasing its surcharge contributions to the Fund. As noted, Respondent does not deny that it ceased paying these contributions without giving the Union notice and the opportunity to bargain. Instead, Respondent's defense to this allegation is that its remittance of those contributions would violate Section 302 of the Labor Management Reporting and Disclosure Act of 1959 (Section 302). As explained below, I reject this defense and find that Respondent violated the Act as alleged.

1. The applicable law

It is well established that benefit fund contributions are mandatory subjects of bargaining that generally survive expiration of the contract. Thus, in the absence of a contrary agreement or other applicable exception, an employer violates Section 8(a)(5) by failing to continue making such contributions after the contract expires. *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 736 (9th Cir. 1981); *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986); *Concourse Nursing Home*, 328 NLRB 692, 702 (1999); *N.D. Peters & Co.*, 321 NLRB 927, 928 (1996). This is true regardless of the employer's good faith or motive for doing so. *Local 777, Democratic Union Organizing Committee (Yellow Cab) v. NLRB*, 603 F.2d 862, 890 (D.C. Cir. 1978).

[9] This mid-sentence pivot was notable. While I have credited Morales on numerous occasions throughout this decision, I find that he attempted on this occasion to refashion his testimony 'on the fly' to render it consistent with the General Counsel's theory of contract formation.

[10] I further rely on the state-of-mind evidence by Respondent witnesses Farley and Capovilla that, during their telephone conversation, Sanders accused Santana of "threatening" him, as well as the testimony by Sanders Jr. and Joyce Sanders that Sanders in fact felt threatened by Santana during the call. I agree with Respondent that such statements by Sanders reveal the acrimony and lack of agreement between the parties as of May 3. See Fed. R. Evid. 803(3).

Section 302, on which Respondent relies, makes it unlawful for an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value to any representative of its employees. Section 302(c)(5)(B) excepts from this prohibition payments by an employer to a trust fund established by any representative of his employees for the benefit of the employees, provided that:

> [T]he detailed basis on which such payments are to be made is specified in a *written agreement* with the employer and the employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representative of the employees may agree upon.

29 U.S.C. § 186(a)-186(c)(5)(B) (emphasis added).

2. Respondent violated 8(a)(5) by unilaterally ceasing its surcharge pension contributions

The record evidence establishes that the Expired Contract both requires Respondent to make contributions to the Fund, as well as to make appropriate surplus contributions to make up for any unfunded liability. See R. Exh. 1, Art. 18.1, 18.4. Consistent with these obligations, Respondent did, until April 2016, make such contributions. Nor is there any dispute that Respondent did, at that point, unilaterally cease making all but its base-rate contributions to the Fund. Respondent, however, argues that, despite its past practice of making surcharge contributions, it was privileged to unilaterally change this practice because making such contributions would violate Section 302. I disagree and find that Respondent's alleged concern over Section 302 does not excuse its failure to bargain.

It is true that, while the Board is not charged by the statute with responsibility for enforcing Section 302, it has found it appropriate to consider the applicability of that provision as a possible defense to unfair labor practice allegations, where the Board's remedy would place a party in the position of being required to comply with two conflicting statutory mandates. *BASF Wyandotte Corp.*, 274 NLRB 978 (1985), enfd. 798 F.2d 849 (5th Cir. 1986). However, where—as here—the alleged violation is a failure to provide notice and the opportunity to bargain, no such risk is present. Instead, as the Board has explained, an employer that believes Section 302 mandates its cessation of benefit contributions remains

> obligated to bargain in good faith with the [u]nion by informing and discussing with the [u]nion the alleged legal mandates with which the Respondent felt constrained to comply, providing an opportunity to bargain over the proposed change and bargaining to impasse.

Quality House of Graphics, Inc. (Local One-L, Graphic Comm. Int'l Union), 336 NLRB 497, 498–499 (2001).

Here, it is undisputed that Respondent gave the Union no notice of its intention to discontinue making the surcharge contributions or its view that such contributions were proscribed under Section 302. Accordingly, I find that, even assuming that making its full

pension contribution would present Respondent with a form of "exigent circumstance" recognized by the Board, this would not excuse its failure to provide the Union with notice and opportunity to bargain over such circumstance. In order to avoid the predicament discussed by the Board in *BASF Wyandotte*, supra, in which compliance with a Board order results in a violation of Section 302, Respondent will be given the chance to prove at compliance that resuming its surcharge contributions would violate Section 302.

CONCLUSIONS OF LAW

1. By unilaterally failing to make pension contributions for certain unit employees from March 2016 to the present, Respondent unlawfully refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

2. The above unfair labor practice affects commerce within the meaning of Section 2(a), (6) and (7) of the Act.

3. Respondent did not violate the Act by failing and refusing to execute and comply with a successor collective-bargaining agreement that embodied the terms of an agreement between Respondent and the Union covering certain unit employees.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I find that it should be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that Respondent unlawfully ceased making contributions to the Fund on behalf of unit employees since April 2016, I shall order Respondent to make whole its unit employees by making all such delinquent contributions on behalf of eligible unit employees that have not been made since those dates, including any additional amounts due the Fund in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).[11]

Further, I shall order Respondent, on request of the Union, to restore the status quo ante that existed prior to April 2016 by continuing to make timely contributions to the Fund on behalf of all eligible unit employees unless and until such time as it bargains with the Union in good faith to a contrary agreement or bona fide impasse.

Finally, I shall order Respondent to post a notice to employees in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

[11] To the extent that an employee has made personal contributions to a benefit or other fund that have been accepted by such fund in lieu of Respondent's delinquent contributions during the period of the delinquency, Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to any amount that Respondent otherwise owes the Fund.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Respondent, Delta Sandblasting Company, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Failing and refusing to timely make required contributions to the Pacific Coast Shipyards Pension Fund without bargaining with the Union in good faith to an agreement or bona fide impasse, on behalf of eligible employees in the following unit:

> All production, repair and maintenance employees employed by Respondent performing work in connection with the construction, conversion, repair or scrapping of any vessel on the Pacific Coast, including but not limited to, sandblasting of dredges, floating dry docks, offshore drilling vessels, barges, Mobil drilling platforms, platforms and all component parts, plant equipment, and all auxiliary equipment used in conjunction therewith and other new work as shall be mutually agreed to by Respondent and the Union; excluding, all employees represented by International Association of Machinists & Aerospace Workers in the bargaining unit defined in Case 20-RC-1275, all employees represented by Northern California Carpenters Regional Council and its affiliated Local Union No. 2236 of the United Brotherhood of Carpenters and Joiners of America in the bargaining unit defined in Case 20-RC-1327, and all employees represented by International Brotherhood of Electrical Workers in the bargaining unit defined in Case 20-RC-2157.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make all delinquent pension contributions on behalf of unit employees that have not been made since April 2016, including any additional amounts due the Fund, as set forth in the remedy section of this decision.

(b) Make unit employees whole for any expenses ensuing from its failure to make the required pension contributions, with interest, as set forth in the remedy section of this decision.

(c) Continue making required contributions to the Fund on behalf of eligible unit employees unless and until it has bargained in good faith to a new agreement or bona fide impasse.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of pension contributions due under the terms of this Order.

(e) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix" at its facilities in Petaluma, California and Alameda, California.[13] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or has closed or ceased doing business at a facility covered by this order, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at those facilities at any time since April 22, 2015.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

It is further ordered that the Complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated: Washington, D.C. September 15, 2017

Mara-Louise Anzalone
Administrative Law Judge

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefits and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT refuse to bargain in good faith with Auto Marine & Specialty Painters Union Local 1176, affiliated with International Union of Painters and Allied Trades, District Council 16 (the Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit (Unit):

> All production, repair and maintenance employees employed by Respondent performing work in connection with the construction, conversion, repair or scrapping of any vessel on the Pacific Coast, including but not limited to, sandblasting of dredges, floating dry docks, offshore drilling vessels, barges, Mobil drilling platforms, platforms and all component parts, plant equipment, and all auxiliary equipment used in conjunction therewith and other new work as shall be mutually agreed to by Respondent and the Union; excluding, all employees represented by International Association of Machinists & Aerospace Workers in the bargaining unit defined in Case 20-RC-1275, all employees represented by Northern California Carpenters Regional Council and its affiliated Local Union No. 2236 of the United Brotherhood of Carpenters and Joiners of America in the bargaining unit defined in Case 20-RC-1327, and all employees represented by International Brotherhood of Electrical Workers in the bargaining unit defined in Case 20-RC-2157.

WE WILL NOT make changes to our contributions to the Pacific Coast Shipyards Pension Fund without giving prior notice to the Union and affording it an opportunity to bargain.

WE WILL, if requested by the Union, rescind any or all changes to your terms and conditions of employment that we made without bargaining with the Union.

WE WILL make whole the Unit employees and the Pacific Coast Shipyards Pension Fund for any loss of contributions, or benefits, and for any expenses incurred in connection with the failure to make those benefit contributions since April 22, 2016.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

DELTA SANDBLASTING COMPANY, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

NLRB Region 20
901 Market Street, Suite 400
San Francisco, CA 94103
Hours: 8:30 a.m. to 5 p.m.
415-356-5130

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-176434 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (628) 221-8875.